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DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[FHWA Docket No. FHWA-2013-0021]

National Bridge Inspection Standards Review Process; Notice

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This Notice finalizes guidance that describes the FHWA internal procedures for review of State compliance with the National Bridge Inspection Standards. It also describes how the FHWA will implement the related statutory penalties against noncompliant States. The FHWA proposed this guidance in a Notice on June 7, 2013. Here, the FHWA updates and finalizes the guidance and responds to the 12 commenters.

FOR FURTHER INFORMATION CONTACT: For questions about the program discussed herein, contact, Thomas D. Everett, Principal Bridge Engineer, FHWA Office of Bridges and Structures, (202) 366-4675 or via e-mail at Thomas.Everett@dot.gov. For legal questions, please contact Robert Black, Office of the Chief Counsel, (202) 366-1359, or via e-mail at Robert.Black@dot.gov. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This notice, the notice requesting comment, related documents, and all comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours each day, 365 days each year. Please follow the instructions. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's Web page at: <http://www.access.gpo.gov/nara>.

PURPOSE OF THIS NOTICE

The FHWA is providing responses to comments received on the Notice published at 78 FR 34424 on June 7, 2013, and publishing the internal administrative processes FHWA uses to review State compliance with the National Bridge Inspection Standards (NBIS) and implement statutory penalties for noncompliance.

BACKGROUND

For more than 30 years, the FHWA has annually assessed each State's bridge inspection program to evaluate compliance with the NBIS as codified at 23 CFR 650 Subpart C. Historically, the depth and scope of the reviews varied based upon the FHWA's knowledge of the State's inspection program and the experience of the FHWA staff. In 2009, the Office of Inspector General (OIG) issued an audit report, National Bridge Inspection Program: Assessment of FHWA's Implementation of Data-Driven, Risk-Based Oversight,¹ summarizing its review of the FHWA oversight of the National Bridge Inspection Program. One of the five OIG recommendations from this audit was for the FHWA to develop and implement minimum requirements for data-driven, risk-based, bridge oversight during bridge engineers' annual NBIS compliance reviews. In

¹ Report MH-2009-013;
http://www.oig.dot.gov/sites/dot/files/pdfdocs/BRIDGE_I_REPORT_FINAL.pdf

Senate Report 110-418,² strong support was given to the OIG recommendations and the need for prompt action by FHWA. In addition, the U.S. House of Representatives Conference Report 111-366,³ directed FHWA to improve its oversight of bridge safety and conditions.

In response to the OIG recommendations and congressional direction, FHWA developed a new systematic, data-driven, risk-based oversight process for monitoring State compliance with the NBIS. The process utilizes 23 metrics, or measures, to define (1) the levels of compliance, (2) items from the NBIS to be measured, and (3) how those measurements would affect the levels of compliance. Each metric can be traced directly to wording in 23 CFR 650 Subpart C. The 23 metrics were developed over a 2-year period by a committee which consisted of FHWA Division, Resource Center, and Headquarters bridge engineers. Refinements were made to the metrics based upon feedback received during implementation. The finalized 23 metrics described in this Notice are contained in the document entitled Metrics for the Oversight of the National Bridge Inspection Program (April 1, 2013) which is available on the docket (docket number FHWA-2013-0021) through the Federal eRulemaking portal at: <http://www.regulations.gov>.

² Senate Report 110-418; <http://www.gpo.gov/fdsys/pkg/CRPT-110srpt418/pdf/CRPT-110srpt418.pdf>

³ House of Representatives Conference Report 111-366; <http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt366/pdf/CRPT-111hrpt366.pdf>

In 2010, the FHWA initiated a pilot program using the new process in nine States. The FHWA made adjustments to the process following the pilot in preparation for nationwide implementation in February 2011.

After the nationwide implementation, a joint FHWA/American Association of State Highway and Transportation Officials (AASHTO) task force was established in the fall of 2011 to identify possible modifications and opportunities to improve the assessment process. One of the first steps the task force completed was gathering input and feedback on the assessment process from all States and interested Federal agencies. The FHWA collected information from internal staff, and AASHTO gathered information from the States. The information collected was used to help identify and prioritize process improvements. The joint task force efforts resulted in FHWA implementing several improvements to the oversight process in April 2012.

On July 6, 2012, President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. 112-141). Section 1111 of MAP-21 amended 23 U.S.C. 144(h)(3)(A)(i) to include provisions for the Secretary to establish, in consultation with the States, Federal agencies, and interested and knowledgeable private organizations and individuals, procedures to conduct reviews of State compliance with the NBIS. The MAP-21 also modified 23 U.S.C. 144(h)(5) to establish a penalty for States in noncompliance with the NBIS.

The FHWA developed and implemented the current process to review a State's bridge inspection program for compliance with the NBIS prior to the requirements of MAP-21, Section 1111. The development of the review process included consultation

with stakeholders through the pilot project, the joint FHWA/AASHTO task force, as well as with individual States and Federal agencies during the initial implementation of the process in 2011. The FHWA will continue to use the current risk-based, data-driven review process to evaluate State compliance with the NBIS as required by 23 U.S.C. 144(h)(4)(A). The FHWA will implement the specific penalty provisions in 23 U.S.C. 144(h)(5) using the process described below.

On June 7, 2013, at 78 FR 34424, the FHWA published a Notice requesting comment on the process the FHWA uses to conduct reviews of State compliance with the NBIS and the associated penalty process for findings of noncompliance. The NBIS Review Process Notice outlined the data-driven, risk-based process used by each FHWA Division to review a State's compliance with the NBIS. The yearly review of a State DOT's highway bridge inspection program focuses on 23 metrics, or specific measures required by the current NBIS regulations at 23 CFR 650 Subpart C. The FHWA Division conducting the review looks at each of the 23 metrics and assigns them one of four compliance level ratings: 1. Compliant (meets criteria); 2. Substantially compliant (meets most criteria except for minor deficiencies); 3. Noncompliant (does not meet one or more of the substantial compliance criteria); or 4. Conditionally compliant (State is adhering to a FHWA approved plan of corrective action for the metric).

If a State highway bridge inspection program receives a "noncompliant rating" for any metric, the State must address the finding in 45 days or prepare a Plan of Corrective Action (PCA) to remedy the noncompliance. The PCA describes the process and timelines to correct the noncompliance. The FHWA must approve the PCA. For

deficiencies identified in a substantial compliance determination for a metric, the State prepares an Improvement Plan (IP) that documents the agreement with FHWA for corrective action to correct the deficiencies. The IP is usually limited to 12 months or less. Through these measures, the FHWA is assured that the State DOT is addressing parts of its highway bridge inspection program that do not comply with the NBIS regulations at 23 CFR 650 Subpart C.

To simplify the reporting of the results of the review, especially for the benefit of parties unfamiliar with the process, FHWA assigns a performance rating for each of the 23 metrics of satisfactory, actively improving, or unsatisfactory. A satisfactory rating means that the State is adhering to the NBIS regulations with perhaps a few minor, isolated deficiencies that do not affect the overall effectiveness of the program. A rating of actively improving means that there is a PCA in place to improve noncompliant metrics. The FHWA will rate the State bridge inspection program as unsatisfactory if metrics rated as noncompliant do not have a PCA or a State is not actively complying with an existing PCA.

The FHWA received 15 sets of comments in response to the Notice published June 7, 2013, from 12 different commenters representing 8 State Transportation Departments, 1 Federal agency, 1 private engineering firm, 1 professional organization, 1 private citizen and AASHTO.

Response to Comments:

General

The FHWA would like to clarify that the internal administrative process described in this Notice is presently followed by FHWA in its review of compliance with the NBIS regulation. The process described in this Notice does not change the current statutory or regulatory requirements of the NBIS.

In accordance with the requirements of MAP-21, FHWA will be updating the NBIS regulation. Comments concerning proposed changes to the NBIS received in this Notice will be considered in the update to the NBIS.

1. Several States and AASHTO commented that significant effort and resources have been directed towards the review process, but question if it is improving overall bridge safety.

The National Bridge Inspection Program ensures the safety of the Nation's bridges. The FHWA's review process merely verifies whether States and Federal agencies are meeting the minimum requirements of the NBIS, which were established to ensure overall bridge safety.

Unfortunately, FHWA has discovered several issues regarding compliance with the NBIS. Examples include the following:

- Critical inspection findings that were not being addressed;
- Overdue inspections;
- Scour critical bridges without plans of action (POA) as identified in 23 CFR 650.313(e)(3);
- Scour critical bridges for which the POA was not properly implemented;

- Unqualified team leaders performing inspections;
- Bridges not being load rated for State legal loads and/or routine permits; and
- Inadequate or nonexistent inspection procedures.

The FHWA recognizes that the review process requires significant effort from FHWA, States, and Federal agencies. As compliance with the NBIS rises to the level expected by the public and Congress, this effort should decrease. Presently, the burden placed on FHWA, a State, or a Federal agency as a result of the review process is commensurate with the level of compliance with the regulation.

2. The Bureau of Land Management suggested a separate evaluation process for Federal bridge owners, with FHWA in a supporting role.

The NBIS apply equally to all States and Federal agencies. Our goal is national consistency; therefore, it is necessary and appropriate that all agencies are held to the same standards.

3. The Iowa DOT suggested that the FHWA should review State and local agencies separately.

The Federal-aid highway program is State-administered and federally assisted. The fundamental relationship under the law is between FHWA and the State. States may delegate functions defined in the NBIS; however, the responsibility for NBIS compliance remains with the State.

The FHWA oversight process reviews both State and local agencies, but the resolution of review findings is between FHWA and the State.

4. Iowa and South Dakota DOTs commented that if a State cannot take action against a bridge owner, action should not be taken against a State for that bridge. Iowa went on to comment that FHWA should take action directly against the bridge owner.

The Federal-aid highway program is State-administered and federally assisted. The fundamental relationship under the law is between FHWA and the State. States may delegate functions defined in the NBIS; however, the responsibility for NBIS compliance remains with the State.

5. The South Dakota DOT commented that the metrics requirements for bridge inspections described in the Notice are likely to result in additional resources being dedicated to bridge inspection, decreasing funds available for structure preservation and replacement needs. The South Dakota DOT stated that “the additional requirements have resulted in an approximately 44% increase in bridge inspection costs for local governments in South Dakota.”

The review process proposed did not establish any new regulatory requirements. The 23 metrics are requirements of the NBIS that have been in place since 2004. The metrics are FHWA’s means of objectively determining how well a State DOT has complied with the NBIS. The costs of the inspection program should not increase for States that were in compliance with the NBIS requirements prior to implementation of the review process.

6. The Virginia DOT commented that the overall NBIS review process is acceptable, but recommended that FHWA “periodically update the NBIS review process based on

lessons learned from the review of different State programs and as issues or conflicts arise.”

The FHWA agrees with the comment. The review process was updated for the 2013 and 2014 review cycles based on lessons learned.

7. The Idaho DOT raised concerns about stability of the review process because the metrics have changed since the 2011 implementation.

The FHWA implemented the changes for the 2013 and 2014 review cycles to address the comments received from the joint FHWA/AASHTO task force and lessons learned. The FHWA anticipates the metric review process established in this Notice will remain stable.

8. The Idaho, North Dakota, and Missouri DOTs, and AASHTO commented that the consistency in FHWA Divisions’ performance of the review process can be improved.

The FHWA considers consistency in the review process a priority. To improve consistency in the review process, FHWA has and will continue to clearly document processes; train staff; provide feedback to field offices; hold frequent teleconferences with field staff; utilize standardized reports, forms, and checklists; conduct annual quality assurance reviews; and provide targeted technical assistance. Quality assurance reviews indicate that there has been marked improvement in the consistency of the FHWA’s assessment of State compliance with the NBIS since the process was introduced in 2011.

9. The North Dakota and Iowa DOTs commented that the review process leaves little room for engineering judgment.

The review process is completely aligned with the NBIS, which establish minimum national standards for bridge inspection programs. Engineering judgment is appropriately applied by bridge owners in deciding when it is warranted to exceed the NBIS minimum standards.

10. The Professional Engineers in California Government (PECG) commented that they firmly believe that the inspection function, especially on critically important infrastructure such as bridges, is inherently governmental in nature and should be performed by public servants. The PECG recommended that FHWA require States to use their own professional staff to perform bridge inspection functions except in very narrowly defined circumstances.

The FHWA does not believe, under the authority of 23 U.S.C. 144, that it can prohibit States from using qualified private consultants to perform inspection duties. The FHWA can set the inspection standards that States must meet in inspecting bridges, but it cannot, without statutory direction, dictate to the States who they must hire to perform inspections.

11. The PECG commented that the bridge inspection organization metric should disallow the State from further delegating bridge inspection responsibilities to local governments.

Many local governments own and maintain the highway bridges within their territorial limits. The State is responsible for ensuring that these bridges are inspected in accordance with all aspects of the NBIS. If a State DOT does not believe the local governmental entity is complying with the NBIS regulations, then the State can address

the problem in many different ways. Each State has its own legal relationship between it and local governmental entities.

Metrics Section Comments

12. The North Dakota and Michigan DOTs commented that the terms used to define the four compliance levels for each metric may lead to confusion for parties not familiar with the process. Instead they recommend using the performance level terms.

The FHWA agrees that the four compliance levels could be misinterpreted by parties unfamiliar with the process. The FHWA proposed in the Notice, and has used the terms “satisfactory,” “actively improving,” and “unsatisfactory” for clarity. The plain language avoids confusion in expressing to parties unfamiliar with the process if a State is complying with the metrics. Satisfactory equates to “compliant” and “substantially compliant”; Actively Improving equates to “Conditionally Compliant”; and Unsatisfactory equates to “Noncompliant.”

13. The Idaho and Iowa DOTs commented that the thresholds for compliance are not attainable.

The NBIS are required by Federal law and are defined in regulation. The compliance thresholds identified in the 23 metrics are provisions of the NBIS. The FHWA can change compliance requirements only through a rulemaking process, which is not the intent of this Notice. In accordance with MAP-21, FHWA will update the NBIS. At that time, consideration will be given to recommendations for changes to the regulation as part of the rulemaking process.

14. The Iowa DOT commented that many of the issues found are National Bridge Inventory (NBI) data entry errors and the findings of the review should be based on findings of inspection problems.

The NBI is a very important part of the NBIS. Quality data within the NBI is vital to ensuring that bridge safety is being appropriately monitored, reported, and maintained. It is also necessary to maintain quality data in order to comply with the Office of Management and Budget guidelines established under Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554 app. C; 114 Stat. 2763, 2763A–154), commonly known as the Information Quality Act. It is FHWA’s position that NBI data submitted by the State should be correct. If it is determined that the source of a compliance issue is data entry errors, in most cases, FHWA can make a final determination of “compliant” once the data issues have been corrected.

15. The North Dakota DOT commented that the review process emphasizes the metrics, “rather than increasing the effectiveness of the program or determining how the bridge inspection program can be improved.”

The annual review is conducted to verify compliance with the requirements of the NBIS. Compliance with all aspects of the NBIS would reflect a highly effective bridge inspection program. The findings of the review are used to address areas which are not in compliance.

16. The North Dakota DOT questioned if all the metrics have equal value and weight.

Yes. The joint FHWA/AASHTO task force discussed this point and agreed that each part of the NBIS is important and should carry equal value and weight.

17. The Michigan DOT commented that it is not clear when the Minimum Assessment Level will be performed.

As identified in the Review Cycle and Schedule section of the Notice, a minimum level review will be performed if an intermediate or in-depth level review is not performed that year. Each metric will have an intermediate level review performed at least once over a 5-year cycle.

18. The Michigan DOT raised the concern that FHWA Division Bridge staff changes will adversely affect FHWA's ability to perform the Minimum Assessment Level.

The FHWA has internal guidance which addresses review requirements when there is a change in staff. This guidance takes into consideration the risk associated with the inspection program and the new FHWA Division Bridge staff knowledge of the program.

19. The Michigan DOT is also concerned that FHWA may not have adequate staff to implement this oversight process in a timely manner.

The FHWA has made this process a priority and has hired additional staff to help implement the process. The FHWA notes that the review process is now in its third year.

20. The Iowa and Michigan DOTs questioned how FHWA will assess element level data for National Highway System (NHS) in the metrics.

The current FHWA review process does not assess element level inspection data. Once FHWA begins collecting element level data for bridges on the NHS, the assessment

process will be revisited to determine the criteria to be used to ensure that quality element data is being reported. We anticipate that the assessment will be very similar to that currently used in the assessment of other data currently reported in the NBI.

21. The South Dakota DOT commented that Metric 1 states under Compliance Levels that a State will be in noncompliance with this metric if it is out of compliance with any of the other 22 metrics.

South Dakota's interpretation of Metric 1 is incorrect. The commentary for Metric 1 states that "[i]f other metrics are noncompliant, a careful evaluation should be done to determine whether or not those noncompliance issues stem from the organizational structure itself. If so, then a finding of substantial compliance or noncompliance would be appropriate."

22. The Michigan DOT commented that FHWA should consider combining the Metrics 2-5 which assess qualifications into to one metric – Qualifications of Personnel.

These metrics are separate to maintain clear and consistent alignment with the NBIS regulation. Each position in a State DOT's bridge inspection organization is important, and Metrics 2-5 are measuring differing qualifications.

23. A commenter from Aason Engineering did not agree with what he interpreted to be a "new bridge inspection frequency criteria stating that a bridge must be inspected no more than 30 days past the required frequency time." He claimed that "[i]n years past, [he] had the flexibility to inspect bridges at any time during May through October."

This comment validates one of the reasons the metric-based review process was implemented. The inspection interval criteria defined in the NBIS have not changed.

The 2004 NBIS Final Rule clarified that there is not a 30-day grace period for the inspection interval. Prior to FHWA's implementation of this review process, this was not uniformly understood or applied. In general, the concerns that commenters made for inspection schedule flexibility will be considered in the NBIS regulation update required by MAP-21.

24. The Virginia DOT commented that using the National Bridge Inventory (NBI) condition code for a substructure rating of poor or worse to place the bridges in the high risk requirement for underwater inspections is overly broad. The high-risk designation should be based on the condition of the substructure below water.

If a bridge substructure has a low condition rating, the FHWA cannot determine from the NBI data if the defect is above or below water. Therefore, to err on the side of safety, these bridges will be included in the higher risk category.

25. The Michigan DOT commented that Metric 12 should not require an additional check of team leader qualifications. Since the State provides a list of team leaders, Metric 12 should be a brief check to verify that a team leader was performing the inspection.

The FHWA agrees with this comment. It is the intent that Metric 12 only verify that a team leader is on site. Some States do not maintain a list of active team leaders, in which case it must be confirmed that the person responsible for the inspection is a qualified team leader.

26. The South Dakota DOT recommended deleting the requirement to load rate existing box culverts and pipes.

The NBIS require that all bridges, including bridge-length box culverts and pipes, be load rated in accordance with the AASHTO Manual for Bridge Evaluation. A change to Metric 13 - Load Rating, does not change the underlying regulation requirement or the AASHTO Manual for Bridge Evaluation. The FHWA encourages South Dakota DOT to address such technical recommendations to the AASHTO Subcommittee on Bridges and Structures. If the Subcommittee changed this point in the Manual, the FHWA may consider changing the requirement in the NBIS.

27. The Iowa DOT commented on Metric 15 - Bridge Files, that when the State has delegated inspection responsibility to local agencies, the State's only option to address deficiencies is to notify local agencies of documentation requirements. The Iowa DOT recommended that notification constitute State compliance because it believes that "[t]here is no reasonable plan of action that can be taken to guarantee all bridge files will have all the significant documents."

The FHWA disagrees that merely informing the owner of the documentation requirements adequately addresses noncompliance issues. Additional steps are needed to verify that corrective actions taken have effectively addressed the noncompliance issues. In the example provided, it is not the FHWA's expectation that the State would check every bridge file. There are several possible solutions to this, one of which could be statistical sampling.

28. The North Dakota DOT commented that "[t]here are instances where grading performance and determining compliance is based on past performance and situations

that existed prior to the metrics being developed. For many older county bridges, the information required is not, and will not be available.”

The metrics are based upon the requirements of the NBIS. The NBIS have existed for many years and have remained essentially unchanged since 2004. The metrics did not create new requirements nor did they modify the existing NBIS. It is understood that there may be situations where historical information may not be available; this should only impact Metric 15 - Bridge Files. This issue is discussed in the commentary for Metric 15.

29. The Iowa DOT commented that Metric 17 - Inspection Procedures, Underwater, should differentiate “between bridges that require divers and ones that don’t. For bridges that require divers, the inspection should be reviewed to make sure the divers had inspection training, the inspection was performed within the frequency required, and the final report contains adequate information.”

The NBIS definition of “underwater inspection” includes clarification that an underwater inspection generally requires diving, and cannot be accomplished visually by wading or probing. Metric 17 assesses only those bridges which require an underwater inspection under that definition. Inspector qualifications and inspection reporting are reviewed in other metrics.

30. The Iowa DOT commented that the tolerances for Metric 22 should be made available to the States.

The FHWA agrees with this comment. The field review form used to assess Metric 22 provides the associated tolerance for each item. This form has been added to the Docket and is available from FHWA Division offices.

31. The Iowa DOT requested the specific data checks FHWA uses for the annual NBI submittal.

The FHWA agrees with the comment and made data checks available at <http://www.fhwa.dot.gov/bridge/nbi.cfm>. The FHWA strongly recommends that States check their data by running the data check programs made available to them at the above mentioned Web site or identified in the annual call for NBI data.

32. The North Dakota DOT commented that the “ ‘one size fits all’ philosophy is not appropriate. A county bridge in North Dakota with less than 200 ADT is treated the same as a bridge located in another part of the country with over 50,000 ADT.”

The FHWA disagrees. When it comes to safety of the traveling public, the timely and proper inspection of all bridges is important.

33. The North Dakota DOT commented that “[r]isk does not seem to be factored into the importance of each metric. The inspection frequency for an 80 year old bridge is the same as a bridge that was just constructed.”

The NBIS establish the minimum bridge inspection standards for the Nation and the thresholds are identified in the regulations, as reflected in the 23 metrics. This comment will be considered when FHWA, in accordance with MAP-21, updates the NBIS to consider a risk-based approach to determine the frequency of bridge inspections.

34. The Michigan DOT commented that “[f]or duration and completion dates of [Plans of Corrective Action (PCAs)], the code is silent on implementation timeliness. The Michigan DOT believes the FHWA should include language and/or guidance that the States are to work with their local FHWA Division on implementing the appropriate timeframes on a case by case basis.”

As stated in the Findings of Noncompliance section of the Notice, the PCA must contain the duration and completion dates for each action and be approved by FHWA. As each issue of noncompliance is unique, it is FHWA’s expectation that the Division will coordinate with the State on the review and approval of those dates. For national consistency, a Bridge Safety Engineer from FHWA Headquarters office will review each PCA.

35. California and Iowa suggested removing the requirement for a written reply for a finding of substantial compliance.

The FHWA disagrees with this suggestion. If a State is not in full compliance with the regulation, there should be documentation of a plan to achieve full compliance.

36. California suggested that FHWA submit a signed, written report to the State for findings of noncompliance or conditional compliance by December 31.

The FHWA agrees that there should be a signed document for metrics determined to be noncompliant or in conditional compliance. The process has been changed to incorporate this comment.

Penalty Provision Comments

37. The Missouri DOT suggested that the August 1 date triggering noncompliance penalties and the August 1 date for submitting an analysis of actions needed to correct the noncompliance should not be the same date.

States are notified by December 31 of a noncompliance issue and have 45 days to address areas of noncompliance or develop a PCA as defined in 23 U.S.C. 144(h)(4)(B). The penalty provision applies when a State remains noncompliant from the December 31 notification until August 1. During this 7-month period FHWA will continue to work with the State to resolve the issue. The State will be aware well in advance of August 1 that an analysis is needed. In addition, by having the analysis completed by August 1, there will be time to dedicate apportioned funds as of October 1, as required by the statute.

38. The Iowa DOT commented on the penalty for noncompliance. In its view, “[s]hifting funds away from needed bridge repair, rehabilitation, or replacement projects seems to be counter intuitive to providing safe bridges for the traveling public. A Non-Compliance issue may have less impact on the safety of the traveling public than cancelled or delayed projects.”

The FHWA recognizes the challenges associated with improving bridge conditions through repair, rehabilitation, and replacement while also maintaining the overall safety for the traveling public. Priority must be given to keeping existing bridges in safe operational condition, which is assured through regular inspections in accordance with the NBIS. When noncompliance occurs, the decision as to the source of funds to be used to address the issue of noncompliance belongs to the State. As with any shifting of

funding for unforeseen issues, States should have a process for assessing and amending the State Transportation Improvement Program and, if needed, the appropriate Transportation Improvement Plan so that critical safety needs do not go unaddressed.

39. The Iowa DOT commented that the “FHWA would be better served if they provided assistance to a State or Local agency that has a compliance issue, rather than imposing penalties. Providing assistance to correct problems would be looked upon more favorably than simply imposing penalties.”

The FHWA has a longstanding history of working with our State partners to resolve issues of noncompliance. The penalty provision established by Congress only applies when a State remains noncompliant from the December 31 notification until August 1, without developing an acceptable PCA. The FHWA will work aggressively with any State that faces noncompliance in order to exhaust all options for avoiding the penalty.

40. The Iowa DOT commented that the analysis plan identified in the penalty for noncompliance should be approved by the FHWA Division office.

The FHWA agrees with this comment. Division offices will be responsible for approving the analysis. This responsibility has been clarified in the description of the process within the Notice.

41. The Iowa DOT questioned if the funding is split 80 percent Federal /20 percent State or 100 percent Federal for the noncompliance penalty.

Under 23 U.S.C. 144(h)(5)(A), the FHWA will require noncompliant States to dedicate their apportioned National Highway Performance Program (NHPP) and Surface

Transportation Program (STP) funds to correct the noncompliance. The Federal share payable on account of any project or activity carried out under the NHPP and STP is specified under 23 U.S.C. 120. In general, the Federal share payable on account of any project on the Interstate System is 90 percent and for other projects is 80 percent. In the case of a State that does not develop and implement a State asset management plan consistent with 23 U.S.C. 119(e), the Federal share payable on account of any project carried out under the NHPP is 65 percent.

42. The California DOT and a private citizen questioned if there is a process for States to appeal the compliance determination.

Appeals of compliance determinations should be directed to the local FHWA Division Office.

Review Process Overview

Each FHWA Division Office annually assesses State compliance with 23 individual metrics that are directly aligned with the existing NBIS regulation. The risk-based assessment process followed during this annual assessment utilizes objective data and employs statistical sampling of data and inspection records. The FHWA Division Office uses the established criteria contained in the Metrics for the Oversight of the National Bridge Inspection Program for assessing compliance for each metric. The State is notified by FHWA of any metric which has a finding of noncompliance no later than December 31. In accordance with the requirements of 23 U.S.C. 144(h)(4)(B) as established by MAP-21, within 45 days of the FHWA notification of noncompliance, the State will correct the noncompliance or submit to the FHWA a PCA which outlines how

noncompliant findings will be corrected. The FHWA will have 45 days to review, comment, and, if appropriate, accept the PCA. The FHWA will make final compliance determinations for each of the 23 metrics no later than March 31. If a State remains in noncompliance for any of the 23 metrics on August 1 following a final determination of noncompliance, FHWA will implement a penalty provision which requires the State to dedicate funds to correct the noncompliance, in accordance with 23 U.S.C. 144(h)(5). This annual process allows FHWA to assess whether each State's bridge inspection program complies with the NBIS and to implement any required penalties for metrics which remain in noncompliance in a nationally consistent manner.

Metrics

The metrics, or specific measures required by the current NBIS regulations, are examined to assess each State's compliance with the NBIS. The following is a list of the 23 metrics which are existing requirements of the NBIS and have been established to provide an assessment of compliance with the NBIS. The complete metrics document entitled Metrics for the Oversight of the National Bridge Inspection Program (April 1, 2013) is available on the docket (docket number FHWA-2013-0021) through the Federal eRulemaking portal at: <http://www.regulations.gov>. Each metric is equally important; noncompliance by the State DOT with any metric can result in FHWA assessing a penalty.

Metric #1: Bridge inspection organization: 23 CFR 650.307

Metric #2: Qualifications of personnel--Program manager: 23 CFR 650.309(a) & 650.313(g)

Metric #3: Qualifications of personnel--Team leader(s): 23 CFR 650.309(a) & 650.313(g)

Metric #4: Qualifications of personnel--Load rating engineer: 23 CFR 650.309(c)

Metric #5: Qualifications of personnel--Underwater bridge inspection diver: 23 CFR 650.309(d)

Metric #6: Routine inspection frequency--Lower risk bridges: 23 CFR 650.311(a)

Metric #7: Routine inspection frequency--Higher risk bridges: 23 CFR 650.311(a)

Metric #8: Underwater inspection frequency--Lower risk bridges: 23 CFR 650.311(b)

Metric #9: Underwater inspection frequency--Higher risk bridges: 23 CFR 650.311(b)

Metric #10: Inspection frequency--Fracture critical member: 23 CFR 650.311(c)

Metric #11: Inspection frequency--Frequency criteria: 23 CFR 650.311(a)(2), (b)(2), (c)(2), (d)

Metric #12: Inspection procedures--Quality inspections: 23 CFR 650.313(a) & (b)

Metric #13: Inspection procedures--Load rating: 23 CFR 650.313(c)

Metric #14: Inspection procedures--Post or restrict: 23 CFR 650.313(d)

Metric #15: Inspection procedures--Bridge files: 23 CFR 650.313(d)

Metric #16: Inspection procedures--Fracture critical members: 23 CFR 650.313(e)(1)

Metric #17: Inspection procedures—Underwater: 23 CFR 650.313(e) & (e)(1)

Metric #18: Inspection procedures--Scour critical bridges: 23 CFR 650.313(e)

Metric #19: Inspection procedures--Complex bridges: 23 CFR 650.313(f)

Metric #20: Inspection procedures--Quality Control/Quality Assessment: 23 CFR 650.313(g)

Metric #21: Inspection procedures--Critical findings: 23 CFR 650.313(h)

Metric #22: Inventory--Prepare and maintain: 23 CFR 650.315(a)

Metric #23: Inventory--Timely updating of data: 23 CFR 650.315(a), (b), (c) & (d)

Each metric consists of four parts: (1) NBIS component to be reviewed; (2) evaluation criteria; (3) compliance levels; and (4) assessment levels.

(1) NBIS Component To Be Reviewed

This section of the metric identifies the relevant provisions of the NBIS and focuses on a key inspection area for which compliance will be assessed.

(2) Evaluation Criteria

This section of the metric identifies the criteria for evaluation of compliance.

(3) Compliance Levels

Each of the 23 metrics is annually assessed by FHWA and assigned one of four compliance levels -- compliant, substantially compliant, noncompliant, or conditionally compliant -- based upon specific thresholds or measures for each compliance level for each metric. These specific thresholds or measures are contained in the NBIS Oversight Program document entitled Metrics for the Oversight of the National Bridge Inspection Program (April 1, 2013). The degrees of compliance are described as follows:

Compliant--Adhering to the NBIS regulation.

Substantially Compliant--Adhering to the NBIS regulation with minor deficiencies, as set forth in the Metrics for the Oversight of the National Bridge Inspection Program (April 1, 2013). These deficiencies do not adversely affect the overall effectiveness of the program and are isolated in nature. Documented deficiencies

are provided to the State with the expectation that they will be corrected within 12 months or less, unless the deficiencies are related to issues that would most efficiently be corrected during the next inspection. An Improvement Plan describing the expected corrective action is required. Metrics which are determined to be substantially compliant will not invoke the penalty for noncompliance.

Noncompliant--Not adhering to the NBIS regulation. In general, failing to meet one or more of the substantial compliance criteria for a metric. Identified deficiencies may adversely affect the overall effectiveness of the program. Failure to adhere to an approved PCA is also considered noncompliance. Metrics which remain as noncompliant will invoke the penalty for noncompliance.

Conditionally Compliant--Taking corrective action in conformance with an FHWA-approved PCA to achieve compliance with the NBIS. Deficiencies, if not corrected, may adversely affect the overall effectiveness of the program. Metrics which are determined to be conditionally compliant will not invoke the penalty for noncompliance.

The following definitions apply to actions taken to address findings of substantial compliance and noncompliance, respectively:

Improvement Plan (IP)--A written response by the State which documents the agreement for corrective actions to address deficiencies identified in a substantial compliance determination. The completion timeframe for such agreements is limited to 12 months or less, unless the deficiencies are related to issues that would most efficiently be corrected during the next inspection cycle.

Plan of Corrective Action (PCA)--A documented actions agreement prepared and submitted by the State and approved by FHWA describing the process and timelines to correct noncompliant NBIS metrics. The term “corrective action plan” in MAP-21 is interchangeable with PCA. An agreed-upon PCA for a noncompliant metric removes the possibility of a penalty based upon that metric.

For each of the 23 metrics, FHWA will assign the following performance levels:

Satisfactory--Adhering to the intent of the NBIS regulation. There may be minor deficiencies, but these deficiencies do not adversely affect the overall effectiveness of the program and are isolated in nature.

Actively Improving--A PCA is in place to improve the areas identified as not meeting the requirements of the NBIS.

Unsatisfactory--Not adhering to the NBIS. Deficiencies exist that may adversely affect the overall effectiveness of the inspection program.

(4) Assessment Levels

The assessment levels represent a key part of the data-driven, risk-based approach to compliance review that FHWA has implemented. The FHWA will conduct the yearly compliance review for each metric at one of three assessment levels. Assessment levels define the scope of FHWA’s review necessary to make a compliance determination for a specific metric. There are three assessment levels:

Minimum Assessment Level--A review based on information from past assessments and the FHWA Division Bridge Engineer’s knowledge of the current practice as it relates to the metric. For some metrics, a minimum level assessment is

enhanced with interviews and/or data review. The minimum assessment can range from a very brief consideration of the metric with respect to any changes in the program since the last assessment to a more detailed look at summary data from bridge inventories, pertinent lists, and a review of historical trends.

Intermediate Assessment Level--Verifying the minimum level assessment through random sampling of inspection records, analysis of bridge inventories, site visits, interviews, and documentation. The intermediate level assessment involves Tier 1 random sampling using a margin of error (MOE) of 15 percent and a level of confidence (LOC) of 80 percent to review bridge records or as directed in the individual metrics. A Tier 2 random sampling, utilizing a MOE of 10 percent and LOC of 80 percent, is used when the results of the Tier 1 sample are inconclusive.

In-depth Assessment Level--Supplementing the intermediate assessment with larger random sample sizes, more interviews, and research of records and documentation, and/or history. The in-depth assessment involves a Tier 1 random sampling using an MOE of 15 percent and LOC of 90 percent or as directed in the individual metrics. A Tier 2 random sampling, utilizing an MOE of 10 percent and LOC of 90 percent, is used when the results of the Tier 1 sample are inconclusive.

Random samples are selected from the population identified for the specific metric.

A copy of the metrics document entitled Metrics for the Oversight of the National Bridge Inspection Program (April 1, 2013) is available on the docket (docket number

FHWA-2013-0021) through the Federal eRulemaking portal at:

<http://www.regulations.gov>.

Annual Review Schedule and 5 Year Review Cycle

In accordance with 23 U.S.C. 144(h)(4), the FHWA will annually review State compliance with the NBIS.

Annual review schedule

Each FHWA Division Office will conduct an annual assessment of the State's compliance with the NBIS. Key dates are as follows:

(a) April 1 – The FHWA begins annual NBIS assessment.

(b) By December 31 – The FHWA makes a compliance assessment, referred to as the “December 31 Compliance Determination” for each metric and issues a signed report to each State detailing issues of noncompliance.

(c) March 31 – Final compliance determination completed for all metrics. The final determination is based on the resolution of compliance issues or development of an acceptable PCA following the December 31 notification.

The proposed schedule may need to be modified on a case-by-case basis when unique and unexpected extenuating circumstances arise. The FHWA will address this issue on a case-by-case basis when it arises.

5-year review cycle

The FHWA will take the following actions as part of the 5-year review cycle:

(a) Assess each of the 23 metrics annually at the minimum level if an intermediate or in-depth level is not to be performed that year.

(b) Assess each of the 23 metrics at the intermediate or in-depth level at least once within the 5-year cycle.

(c) Adopt a 5-year plan which identifies the review strategy and schedule based upon the consideration of risk. The assessment level for each metric will vary at the discretion of the FHWA Division Office from minimum, intermediate, or in-depth, or as directed at the national level. The FHWA will update the 5-year plan as necessary based on the risks identified during the annual metric assessments.

(d) In year five, examine the 5-year review history to identify trends in each metric area, to identify any gaps in the program or review process, and to develop a review strategy for the next 5 years.

(e) At the completion of a PCA, assess the metric at the intermediate level or in-depth level.

The determination of either an intermediate or in-depth level review after completion of a PCA is at the discretion of the FHWA Division Office.

Findings of Noncompliance

The FHWA Division Office will issue a signed report to the State detailing the issues of noncompliance for a metric determined to be noncompliant by December 31 of the review period. The report will list the regulatory code and title for each noncompliance deficiency, identify the deficiency, and specify that the deficiency has to be corrected, or a PCA submitted, within 45 calendar days of notification. The State will have 45 days to either correct the issue of noncompliance or submit a PCA to FHWA as

required by 23 U.S.C. 144(h)(4)(B). The PCA should, at a minimum, include the following information:

- (a) Identify area of noncompliance;
- (b) Identify the date FHWA notified State of noncompliance;
- (c) Identify actions to be taken to address areas of noncompliance;
- (d) Estimate duration and completion date for each action;
- (e) Define frequency and reporting format which will be used to monitor; progress towards successful completion of the PCA; and
- (f) Identify what the State considers to be successful completion of PCA.

After the State submits a PCA, FHWA will have 45 calendar days to review and if appropriate, accept the submitted PCA. Upon FHWA acceptance of the PCA, the final compliance determination for the associated metric will be conditionally compliant. If the PCA is not submitted to FHWA in 45 calendar days after notification of noncompliance, or the PCA does not address the issues of noncompliance, the final compliance determination for the associated metric will be noncompliant.

Where an issue of noncompliance with the NBIS is identified outside the review procedures above, FHWA will notify the State of the noncompliance and will work with the State to establish a timeframe in which the issue of noncompliance must be addressed or an acceptable PCA submitted.

Penalty for Noncompliance

The FHWA will continue to encourage the State to address the noncompliance issues following the final noncompliance determination and expiration of the period

allowed to develop a PCA. If a State remains in noncompliance for any of the 23 metrics on August 1 following a final compliance determination of noncompliance, FHWA will require the State to dedicate funds to correct the noncompliance, in accordance with 23 U.S.C. 144(h)(5). The State must submit an analysis of actions needed to correct the noncompliance to the FHWA Division Office no later than August 1. The analysis must identify the actions to be taken, estimate a duration and completion date for each action, and itemize an amount of funds to be directed for each action. The analysis plan will require the approval of the FHWA Division Office. The FHWA will require on October 1 of that year, and each year thereafter as may be necessary, the State to dedicate funds apportioned to the State under sections 23 U.S.C. 119 and 23 U.S.C. 133 to correct the issue of noncompliance.

Authority: 23 U.S.C. 144 and 315; 23 CFR 1.32, and 650 Subpart C; 49 CFR 1.85.

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